Summary of SC94393, *Paige Parr, a minor, by and through her Conservator, Janett Waid, Jerimy Moorehead and Charles Parr v. Charles Breeden, Wendy Cogdill and Melany Buttry*

Appeal from the New Madrid County circuit court, Judge Fred W. Copeland
Argued and submitted February 24, 2015; opinion issued June 7, 2016

Attorneys: The Parr family members were represented by Shaun D. Hanschen and Rachel R. Harris of Blanton, Rice, Nickell, Cozean & Collins LLC in Sikeston, (573) 471-1000. The co-employees were represented by Michael S. Hamlin and Robyn Greifzu Fox of Pitzer Snodgrass PC in St. Louis, (314) 421-5545, and Ted L. Perryman, John Schaberg and Josh S. Owings of Roberts Perryman PC of St. Louis, (314) 421-1850.

Overview: Family members of a truck driver who died in a single-vehicle accident filed a wrongful death lawsuit against three of his supervisory co-employees and now appeal the circuit court's summary judgment (judgment on the court filings, without a trial) in favor of the co-employees. In a decision written by Chief Justice Patricia Breckenridge and joined by three other judges, the Supreme Court of Missouri affirms the judgment. The existence of a duty is purely a question of law – whether a personal duty exists depends on the particular facts and circumstances of each case. The family members' evidence fails to establish that the co-employees owed the truck driver a duty separate and distinct from their employer's nondelegable duty to provide a safe workplace.

Judge Zel M. Fischer concurs in result but would continue to apply a "something more" test, effectively codified in a 2012 amendment to the state's workers' compensation law, consistently with its well-established meaning – that an employee may sue a fellow employee only for affirmative negligent acts outside the scope of the employer's responsibility to provide a safe workplace.

Judge Paul C. Wilson also concurs in result. For the reasons stated in his separate opinion in *Peters v. Wady Industries Inc.*, also decided today, he is doubtful about the discussion of common law co-employee liability.

Judge Richard B. Teitelman dissents. He would find that an employer's obligation to protect its employees does not extend to injuries caused by the negligence of employees in carrying out the details of the work directed by the employer and that the family members' petition raised factual issues that preclude summary judgment.

Facts: Kevin Parr began working as a truck driver for Breeden Transportation Inc. in June 2006. During his employment, he was involved in three single-vehicle accidents, the last of which killed him. After Parr's first accident a December 2006, a medical examiner certified Parr in November 2007 as physically fit to operate a commercial motor vehicle. Six months later, on April 11, 2008, Parr was involved in his second single-vehicle accident. Then, on April 28, 2008,

the commercial vehicle he was driving left the road in a single-vehicle accident, and he died as a result of his injuries. Two years later, his surviving family members filed a wrongful death action against three of Parr's supervisory co-employees, Charles Breeden, Wendy Cogdill and Melany Buttry. The family members asserted that the co-employees breached a duty to Parr by keeping him on the road without a medical examination following his April 11, 2008, accident; failing to inquire whether Parr had a health condition that would have contributed to his prior two single-vehicle accidents and placing Parr back on the road when they knew or should have known he was not safe to operate a motor vehicle. They allege that the co-employees each were partly responsible for making sure Breeden Transportation drivers were safe to operate a commercial motor vehicle; that Parr was suffering from severe coronary artery disease, diabetes, obesity and probable sleep apnea; and that the November 2007 medical examiner's report indicated Par smoked and was overweight. The circuit court granted summary judgment in favor of the co-employees. Parr's family members appeal.

AFFIRMED.

Court en banc holds: The family members failed to establish, as a matter of law, that the co-employees owed Parr a duty separate and distinct from their employer's nondelegable duty to provide a safe workplace. Under *Peters v. Wady Industries Inc.*, also decided today, the workers' compensation law does not preclude plaintiffs from bringing a common-law action for negligence against co-employees if the plaintiffs can show the co-employees owed a duty separate and distinct from the employer's nondelegable duties. When a co-employee is performing the employer's nondelegable duty to provide a safe workplace, liability attaches to the employer, not the co-employees. Here, the duties the surviving family members allege the co-employees owed to Parr were part of Breeden Transportation's nondelegable duty to provide a safe workplace. Further, neither federal regulations, nor cases finding negligence *per se* from violations of statutes or administrative rules nor the co-employees' admissions that they were responsible for the safety of the drivers impose a personal duty separate and distinct from the employer's nondelegable duty to provide a safe workplace. The 2014 appeals court conclusion in *Leeper v. Asmus* that a jury first must determine whether a workplace injury could be attributed to the employer's breach of nondelegable duties and that such a determination controls whether the co-employee could be liable in negligence is inconsistent with this Court's 1935 decision in *Kelso v. W.A. Ross Construction Company*. It is well-established that the existence of a duty is purely a question of law – whether a personal duty exists depends on the particular facts and circumstances of each case. The family members' evidence here fails to establish that the co-employees owed Parr a duty separate and distinct from Breeden Transportation's nondelegable duty to provide a safe workplace.

Opinion concurring in result by Judge Fischer: The author concurs with the result reached by the principal opinion but would overrule the appeals court's decision in *Leeper v. Asmus* and would continue to apply the "something more" test consistently with its well-established meaning in this Court – that an employee may sue a fellow employee only for affirmative negligent acts outside the scope of the employer's responsibility to provide a safe workplace. The legislature effectively codified the "something more" test in its adoption of the 2012 amendment to the workers' compensation law.

Opinion concurring in result by Judge Wilson: The author concurs in the result reached by the principal opinion. For the reasons stated in his separate opinion in *Peters v. Wady Industries Inc.*, also decided today, he is doubtful about the discussion of common law co-employee liability.

Dissenting opinion by Judge Teitelman: The author would reverse the judgment of dismissal and send the case back for further proceedings. He would find the family members' petition raised factual issues that preclude summary judgment. When Parr was injured, the relevant workers' compensation statute did not release co-employees from co-employee liability; such claims were governed by common law. Under *Leeper v. Asmus* and other common law cases, the employer's obligation to protect its employees does not extend to injuries caused by the negligence of employees in carrying out the details of the work directed by the employer. The family members' petition alleges that Parr's supervisors breached their duty to ensure Parr was able to drive the tractor-trailer safely.